Supreme Court, U.S.

No. 051457 MAR 18 2006

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

WILLIAM EDGAR BOWEN, JR.,
Petitioner,

versus

COMMONWEALTH OF KENTUCKY,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Kentucky

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PETITION FOR A WRIT OF CERTIORARI
With Appendix

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QUESTION PRESENTED FOR REVIEW

I. Are the 6th and 14th Amendments to the United States Constitution violated when a Defendant is denied a timely and proper motion to continue his case for trial to obtain a new expert witness due to the death and absence of the defendant's expert witness who died two days prior to the commencement of the trial who would have presented relevant evidence to refute charges of sexual abuse and sodomy.

LIST OF PARTIES

The parties to the proceedings below were William Edgar Bowen, Jr. and the Commonwealth of Kentucky.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1-2
STATEMENT OF THE CASE	2-14
REASONS FOR GRANTING THE WRIT	14-22
CONCLUSION	22
APPENDIX	A1-A13

TABLE OF AUTHORITIES

PAGE

Cases:

Commonwealth v. Craig, 783 S.W.2d 387 (Ky. 1990) 20
Commonwealth v. Rose, 725 S.W.2d 588 (Ky. 1987) 20
Crane v. Kentucky, 476 U.S. 683 (1986) 18
Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed. 2d 469 (1993) 4, 10, 16, 21
Dyer v. Commonwealth, 816 S.W.2d 647 (Ky. 1991) 20
Pendleton v. Commonwealth, Ky., 685 S.W.2d 549 (1985) 3, 15, 20
Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 891 (1997) 17, 21
Tungate v. Commonwealth, 901 S.W.2d 41 (Ky. 1995) 20, 21
United States v. Cross, 928 F.2d 1030 (11th Cir. 1991) 17
U.S. v. Romero, 189 F.3d 576, 581-588 (7th Circuit 1999) 16, 17, 18

Constitutional Provisions:

6th Amendment, U.S. Constitution 1, 3, 17, 18, 19
14th Amendment, U.S. Constitution 2, 18, 19
Section 11 of the Kentucky Constitution 3
28 U.S.C. section 1257(a) 1

Statutes and Court Rules:

Kentucky Rules of Criminal Procedure (RCr) 9.04 2

William Edgar Bowen, Jr., Petitioner herein, respectfully prays that a writ of certiorari issue to review the memorandum opinion of the Supreme Court of Kentucky, rendered in the above-entitled case on September 22, 2005.

OPINION BELOW

The opinion of the Supreme Court of Kentucky from which review is sought appears in the Appendix, pages A1-A12, (App., pp. 1-12) to this petition and is an unreported memorandum opinion styled *Bowen v. Commonwealth*, Ky., 2003-SC-0744-MR.

STATEMENT OF JURISDICTION

The memorandum opinion of the Supreme Court of Kentucky was rendered on September 22, 2005. A copy of that decision appears at App. A1-A12.

A timely petition for rehearing was denied by the Kentucky Supreme Court on December 22, 2005. A copy of the order denying rehearing appears at App. A13.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

6th Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

14th Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Raising the Federal Constitutional Question

Question I – Trial counsel, in conformity with Kentucky Rule of Criminal Procedure (RCr) 9.04 tendered a motion to continue petitioner's case for trial due to the absence of Dr. Richard Gardner, petitioner's expert witness, on the ground that Dr. Gardner had become extremely ill just prior to trial, notifying trial counsel of his condition. Dr. Gardner, unknown to trial counsel, died Sunday, May 25, 2003, two (2) days prior to the scheduled trial, May 27, 2003. After hearing, the trial court, noting that failure to allow a continuance to obtain another expert was most likely reversible error, overruled petitioner's motion for a continuance opining, in pertinent part, that based on Dr. Gardner's written report, Dr. Gardner's "...testimony is so outside the realm of the proof required to show that these crimes were committed and that the defendant committed them, [they] should not under any circumstances be admissible." (State Transcript of Proceedings, Volume I, pages 25, 3-34; hereinafter, "TP, Vol. ___, pp. ___")[1]

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[1] Petitioner's trial record is maintained as part of the official record on appeal. Petitioner's trial was recorded by a court stenographer. The transcript of the trial is a part of the official record on appeal. Citations to the transcript of proceedings conform to the volume and page number.

Trial counsel objected to the trial court's denial of his motion to continue referring to the dissenting opinion of former Kentucky Supreme Court Justice, Charles M. Leibson, in the case of *Pendleton v. Commonwealth*, Ky., 685 S.W.2d 549 (1985) in which Justice Leibson opined against the exclusion of similar evidence on the ground that *Pendleton* had a constitutional right to refute the testimony against him citing the 6th Amendment to the United States Constitution and Section 11 of the Kentucky Constitution. *Pendleton*, supra, at 555. Trial counsel orally argued against the trial court's ruling as follows:

> "The reason we want to call Dr. Gardner is for his testimony that Mr. Bowen's mental condition is not one that is the kind that would commit this kind of offense.
>
> And like Judge Leibson says in his dissent, which I think is going to be the law in the state of Kentucky, is that that denies him the right to present a defense to a bare allegation that he committed the offense of sodomy and sexual abuse otherwise it becomes a swearing match.
>
> And I think, as Justice Leibson said, that it is admissible. And there is no way I can hold an adequate *Daubert* hearing without Dr. Gardner here or someone else here to testify. Because I have no way of adequately cross-examining Mr. Raley's witness." (TP, Vol. I, p. 22)

Trial counsel also raised this constitutional issue on appeal to the Supreme Court of Kentucky. The Kentucky Supreme Court addressed this issue in its Opinion, opining:

> "Appellant now argues that failure to grant his motion for continuance denied him his constitutional right to present evidence to refute the charges against him. Ky. Const. § 11; U.S. Const., Amends. VI, XIV. He also argues that the court erred in not holding a

Daubert hearing on the admissibility of Dr. Gardner's testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed. 2d 469 (1993). We disagree." (App., p. 9)

B. Material Facts

Petitioner, William Edgar Bowen, Jr., was convicted of sexual abuse in the first degree and sodomy in the first degree as charged in the indictment filed in the Bullitt Circuit Court (State Transcript of Record, Volume I, pages 15-16; Volume V, pages 694-696, hereinafter "TR Vol. __, pp. ___")[2] based solely on the uncorroborated testimony of the alleged victim Jennifer Smothers (hereinafter "JS") whose testimony prior to and during trial were contradictory, incredible and inherently improbable as to both charges (TP, Vol. I, pp. 105-144; TP, Vol. II, pp. 25-40) In fact, J.S. completely denied and contradicted the testimony of the investigating officer, Trooper Tapp, on the existence of the factual basis for the offense of Sexual Abuse in the First Degree (TP Vol. II, pp. 25-27). Petitioner had no prior convictions. (TR, Vol. V, pp.697-701).

Petitioner, William Edgar Bowen, Jr., and his wife Myrtle Bowen were married in May of 1971 after Mr. Bowen returned from military service and were married at the time of the alleged incidents and the trial herein and remain married at this time. (TP Vol. IV, p. 56) For eighteen (18) years prior to the trial, Mr. Bowen worked full time at Olympic Stain as a paint mixer mostly on the second shift. (TP Vol. IV, pp. 52, 61). During this period of time Mr. Bowen also worked at odd jobs during the day when he was working the second shift at Olympic Stain

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[2] All written pleadings, opinions and other documents are maintained as part of the record on appeal which is officially referred to as the "Transcript of Record." Citations to the Transcript of Record conform to the volume and page number.

that began at 3:45 p.m. and lasted to 12:30 a.m. or later if he worked overtime. He worked part-time at Highland Memorial Gardens Cemetery to earn extra money from 7:30 a.m. until 12:00 p.m. (TP Vol. IV, pp. 63-64). When Mr. Bowen did not work during the day, he would eat lunch between 11:00 a.m. and 12:00 p.m. and would leave his home in Mt. Washington, Kentucky, at approximately 2:45 p.m. before the second shift started at 3:45 p.m. When he did work day shift at Olympic Stain, the first shift hours were from 7:00 a.m., requiring him to leave home at 6:00 a.m., and ended at 3:45 p.m., on most occasions, arriving back home in Mt. Washington after 4:00 p.m. (TR Vol. IV, pp. 65-67).

To make extra money, his wife, Myrtle, cared for children of the local community whose parents worked, including the children of two (2) school teachers who also schooled the alleged victim, JS, as a student in their classrooms (TR Vol. II, pp. 145-154). JS, was cared for by Mrs. Bowen in her home from age two (2) to age twelve (12) and she continued to visit the home until her last visit in December, 2001, with no allegations of any improprieties. (TP Vol. I, 117-118).

On March 27, 2002, some three (3) months after the Christmas visit, JS, was interviewed by Trooper Tapp of the Kentucky State Police and Mary Ellen Murray, a social worker, at the offices of the Cabinet for Families and Children in Bullitt County, Kentucky for approximately two (2) hours concerning allegations she made to her mother about sexual abuse and sodomy that allegedly occurred when she was five (5), six (6), or seven (7) years old allegedly perpetrated by Mr. Bowen at the Bowen home. At the conclusion of this interview, JS wrote out her own handwritten statement which was introduced at trial into the record as "Defendant's Exhibit #2" in which she specifically writes that Mr. Bowen masturbated on her stomach

but makes no mention of any other inappropriate act. (TP. Vol. I, pp. 134-135). At trial, JS admitted that at no time did she ever tell Mrs. Bowen or her mother about the alleged incidents until after a conversation with a peer, "Nicki", who told her own mother who in turn related the alleged incident to JS' mother (TP Vol. I, pp. 117, 130).

Numerous other witnesses, whose children were kept by Mrs. Bowen at her residence, all testified on behalf of Mr. Bowen that neither their children, nor they, ever saw anything or heard anything inappropriate regarding Mr. Bowen and his relationship with JS or, for that matter, any other child, and that he was always appropriately dressed around the children. (TP Vols. II, III and IV). One witness, a school bus driver who picked up and delivered the children to and from the Bowen residence for school, testified that JS was one of the children she transported, that she had been trained to spot indications of sexual abuse in the school children she transported and that JS never, on any occasion, exhibited any of the indications of abuse she had learned. (TP Vol. II, pp. 140-144). Another witness, Lisa Renee Stewart, has a son who had been a victim of sexual abuse, whom she placed in Mrs. Bowen's care while she worked at Jewish Hospital in Pediatrics as a visiting nurse. She, knowing the symptoms of sexual abuse in a child, testified that she observed none of those indications in JS, whom she knew due to her contact with the Bowen family through her children. (TP Vol. IV, pp. 22-25). Both teachers, whose children were also kept by Mrs. Bowen and who had taught JS in their classrooms, testified that they were trained to be aware of and observant for indications of abuse in children, and they did not at any time observe any of these characteristics in JS. As important, both testified that their children told them everything that happened at the Bowen home and that there was never any mention of any inappropriate statements or

acts by Mr. Bowen and that neither they nor their children ever observed Mr. Bowen inappropriately dressed. (TP, Vol. II, pp. 145-154).

On March 27, 2002, after interviewing JS, Trooper Tapp and Mary Ellen Murray went to the Bowen residence where Detective Tapp, after approximately two (2) hours of ongoing interrogation of Mr. Bowen, took a taped statement from Mr. Bowen. Trooper Tapp's version of the interrogation and Mr. Bowen's testimony regarding the interrogation differ markedly. Trooper Tapp testified that he took Mr. Bowen aside to the bedroom and asked Mr. Bowen if he had any "green shorts" (supposedly those that JS alleged Mr. Bowen wore around the house in front of the children and at the time of both the alleged sodomy and the alleged sexual abuse and which, incredibly, would then have been more than seven (7) to ten (10) years old). Mr. Bowen testified that Trooper Tapp had asked to see his underwear and that he initially thought he meant those he had on but realizing his mistake showed him jockey briefs. (TP Vol. IV, pp. 73-75). Then Tapp asked if he had any green boxer shorts and Mr. Bowen showed him his green "swimming trunks." Trooper Tapp testified that he toured the house before taking Mr. Bowen's taped statement and that he conducted no interrogation prior to taking the statement (TP, Vol. II, pp. 45-47; 53-54, 57). The green trunks were not taken for evidence by Tapp. (TP, Vol. II, pp. 54-56, 67).

Trooper Tapp's investigative time log, however, belies his testimony and verifies Mr. Bowen's version of the interrogation and taped statement. The time log shows that Trooper Tapp and Ms. Murray arrived at the Bowen residence on Flatlick Road in Mt. Washington, Kentucky, at 13:49 hours (1:49 p.m.) and left the residence at 15:56 (3:56 p.m.). The taped statement was taken from 15:45 to 15:55 (3:45 p.m. to 3:55 p.m.), after over one and one half